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# Historical institutionalism and Competition Policy: the Regulation 17/62 (1962-2002)

-- Draft Paper --

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## *Summary*

Paul Pierson's historical institutionalism states that institutional choices could lead to unanticipated consequences in the long term. This paper aims to illustrate this theory with the example of Competition Policy, drawing on the negotiations that led to the first important regulation in this field, Regulation 17/62. It will show that neither the member-states nor the European Commission, who have negotiated this regulation, had anticipated its short-term and long-term institutional consequences. In a first phase, the Commission was stalled by the drawbacks of the agreement, whereas in a second phase –twenty years later- this regulation was successfully used as a tool to strengthen dramatically Competition Policy, until its reform in 2002 (Regulation 1/2003).

## *Paper*

The importance of history in political science is recognized by several recent studies<sup>2</sup> (Kaiser 2008). This is especially true for the historical institutionalist approach, which was developed in particular by Paul Pierson (Pierson 1996). According to him, History is especially useful to answer several unresolved questions such as why an actor accepts an unfavorable outcome and why is it very difficult to reverse previous decisions in the EEC/EU institutional system. Pierson underlines the importance of institutional path-dependencies, which constrain the liberty of the EEC/EU actors (be they nation-states, European institutions or lobbies) in their choices. Several factors could explain this: the partial autonomy of EEC institutions, the restricted time horizons

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<sup>2</sup> Andrew Moravcsik, *The Choice of Europe. Social Purpose and State-power from Messina to Maastricht*, London, UCL, 1999 ; Bertold Rittberger, *Building Europe's Parliament: Democratic Representation beyond the Nation-State*, Oxford, Oxford UP, 2005; Craig Parsons, *A Certain Idea of Europe*, Ithaca, Cornell UP, 2003.

of political decision makers, the changes in national preferences, the spillover effect, the difficulty to manage the large number of issues at stake, etc. In terms of Competition Policy, historical institutionalism could be useful to explain the origins, the initial failure and the success of the first important legislative cornerstone, the Regulation 17/62.

### ***I: Regulation 17/62***

The Regulation 17/62 of February 1962 gave very large powers to the European Commission with regards to cartels (agreements between two or more firms). It enabled it to take alone the decisions on the conformity of cartels with the Rome Treaties. It supplied it with information, as every companies within the EEC had to declare their agreements with other companies if they might impede the intra-EEC trade (notification process). All agreements are forbidden unless they had an explicit authorization from the Commission. This regulation was seen as a success for the Commission for many observers. Indeed, the provisions concerning Competition Policy in the Treaty of Rome creating the EEC (1957) were quite general and could have been interpreted in very different ways.

The Regulation 17/62 was especially disappointing for French officials (Warlouzet 2007). From the institutional point of view, they would have preferred a more intergovernmental system and from the economical point of view, they favoured a benign approach towards cartels. To explain the French decision to eventually vote for the Regulation 17/62, after having opposed it during most of the negotiations (1960-1962), an intergovernmental analysis could offer a clue: French officials gave up on the Competition Policy issue to Germany –the main supporter of the Regulation, in order to gain concessions in another field, the Common agricultural policy (CAP).

However, this explanation is insufficient. Firstly, Germany did not make concessions on the CAP just after the agreement on the future 17/62 Regulation. It took several more weeks of harsh negotiations –the first agricultural “marathon”, to reach an agreement. Secondly, the French decision to support the Regulation at the very end of the negotiations could be explained by a very powerful political factor: the fear to be isolated as no other countries –with the exception of Luxemburg, was opposed to the regulation. In the end, French officials chose to give up their opposition in order to get concessions and to avoid losing political credit. If they had had more allies, they might have taken another decisions. Therefore, it is important to understand why the French had been isolated.

Historical institutionalism is useful to explain why French officials were so inefficient in the 17/62 negotiations. To begin with, they underestimated the dynamics of supranational

institutions. In particular, they considered the European Parliamentary Assembly as useless as it was purely consultative in this field. However, after the Assembly broadly supported the Commission's proposal, the intellectual debate was lost for France in the Council. Even an institution without formal powers could have an impact on the decision-making process. The European Commission too, succeeded in this negotiation as the future 17/62 Regulation was strongly criticized when it was firstly presented in 1960. The Commission had two advantages. Firstly, it had the support of a strong economic doctrine, ordoliberalism, defend by a devoted network of German and European officials (Leucht-Seidel 2008). In such a new field as Competition Policy, the intellectual battle was crucial, as the influence of the European Assembly showed. Secondly, the Commission manage to take advantage of the Council's divisions to promote its ideas, whereas French officials thought –in an intergovernmental way, that divisions within the Council would stalled the Commission's action.

Another factor was purely French. Competition Policy was a secondary issue in French politics. There was no department in the French administration devoted to this policy. That's why French official underestimated the consequences of the 17/62 regulation. In such an unknown field, they could not foresee that the Commission could gain so much power.

## ***II: Applying 17/62***

From 1962 onwards, the European Commission tried to apply the 17/62 Regulation. However, it was quickly paralyzed by an enormous flow of notification. The European companies declared to the European Commission a very large number of agreements, often the most minor ones. Understaffed and unable to set policy guidelines in such a new and complex field, the European Commission was paralyzed during dozens of year. In a few months, it received 36.000 declarations. It took it first decision only in 1964. In 1968, seven years after the regulation, it had taken only five decisions.

Here too, historical institutionalism is useful. The European Commission officials underestimated the institutional flaws of their proposals. By concentrating all the powers on one young institution, the regulation had paralyzed it. They have created a “path-dependency”: all the main actors of the EEC system (the Commission but also France and Germany) recognized the flaw of the regulation 17/62 but it was impossible to solve this problem. To renegotiate the regulation from scratch would have triggered a lengthy and painful discussion. To complete the regulation with other secondary regulations was possible but still difficult as the initial structure (monopoly of decision by the Commission, declaration system) must be kept. Eventually, the

Commission obtained several grant exemptions, i.e. the possibility to exclude several types of cartels from declaration, in order to alleviate its burden of notification. However, the Commission's action was stalled by the institutional design of 17/62 during all the 1960s and the 1970s.

### ***III: Benefiting from 17/62***

From 1981 onwards, a new period opened for the DG IV, the Commission's unit in charge of Competition Policy. It benefited from the appointment of dynamic commissioners for competition (Andriessen in 1981, Sutherland in 1985 and Brittan in 1989) and from the development of neoliberal ideas. Moreover, the institutional flaws of the 17/62 were progressively turned into assets. During the 1970s, the Commission took several decisions and progressively built a doctrine. At the beginning of the 1980s, it issued a large number of grant exemptions in order to solve the notification problem. Moreover, it used its large powers given in the cartel fields by the 17/62 Regulation to increase its influence in other fields. For example, Commissioner Sutherland threaten to take decisions unilaterally for mergers, even though there was no agreement on a merger regulation within the Council (Büthe-Swank 2007). The experience of the implementation of the 17/62 Regulation might have played a role to enhance the Commission's threat and the Merger regulation was voted eventually in 1989. Finally, the Regulation 17/62 was reformed and replaced by the Regulation 1/2002. The 40 years gap shows clearly the path-dependency effect.

To conclude, this example shows the usefulness of historical institutionalism to understand the flaws and evolution of complex EU policies. In such a new and technical field as competition Policy, it is impossible to rely neither on the rational choice model nor on a neofunctionalist approach because even the supranational actors can be trapped into path dependencies.

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